No. 84-1070

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LARRY WITTERS,

Petitioner,

v.

STATE OF WASHINGTON
COMMISSION FOR THE BLIND,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Washington.

BRIEF OF THE NATIONAL LEGAL CHRISTIAN FOUNDATION, AMICUS CURIAE, IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Legal Christian Foundation is deeply concerned about the pervasive religious discrimination implied in the state of Washington Supreme Court's decision in this case. The Foundation believes this decision misinterpreted both the U.S. Constitution and the Washington Constitution when it

[1] Counsel of record to both parties in this case have consented to the filing of this brief and letters of consent have been filed with the Clerk of the U.S. Supreme Court pursuant to rule 36.

refused to fund a blind student's choice of education merely because he chose to attend a Bible school. The state governments and the Federal Government, ever since the beginning of this century, frequently have made public money available to students of various classifications with no restrictions except that such public money be used for higher education. A student receiving public money could study to be anything he wanted: a lawyer, doctor, pastor, engineer, philosopher, or anything else. The Washington statute authorizing assistance to the handicapped and its application in this particular case, does *not* advance religion. It merely provides equally to all handicapped students the necessary financial assistance to attain the vocation of their choice. The primary effect of the statute is to asssit the visually handicapped to enable them to support themselves. For the Washington Commission of the Blind to prohibit a blind student from receiving public money merely because he chose to acquire an education which would enable him to become a pastor, missionary, or Christian educator, has unconstitutionally discriminated against this blind student, denying him equal participation in public benefits which all his fellow blind students enjoy. In addition, the blind student's right to freely exercise his religion by choosing a religious vocation instead of a secular one is clearly inhibited by the Washington Commission's denial. Finally, since the Washington Commission for the Blind's program to aid the visually handicapped is neutral in its primary effect, the Establishment Clause of the First Amendment does not prohibit the Commission from allowing a religious student to benefit. Although the Establishment Clause prohibits the establishment of religion, it also requires the accommodation of that religion.

The National Legal Christian Foundation is a non-profit religious organization established in order to preserve the religious liberties guaranteed by the U.S. Constitution, especially in the area of education. Through frequent national symposiums, seminars and a monthly newsletter, the National Legal Christian Foundation promotes awareness and addresses religious education issues on both state and national

levels which have a significant impact on religious freedom in the United States.

Amicus curiae is represented by a participating attorney with the National Legal Christian Foundation, Counsel John Eidsmoe. Counsel Eidsmoe specializes in constitutuional litigation and teaches constitutional law at O. W. Coburn School of Law. He has assisted The Rutherford Institute, The Christian Legal Society and Concerned Women for America's Education and Legal Defense Foundation in First Amendment litigation on numerous occasions. Counsel Eidsmoe is also the author of several books and articles devoted to the interpretation and application of the First Amendment and other religious freedom clauses to contemporary legal issues. This brief is filed to provide assistance and views to the court relating to the Establishment Clause of the First Amendment and public financing of higher education.

STATEMENT OF FACTS

Amicus curiae adopt by reference the facts outlined in the petitioner's brief. It should be emphasized first of all, that Larry Witters has met and does meet the medical and physical eligibility requirements specified under chapter 74.16 of the Revised Code of Washington for status as a legally blind person qualifying him to receive educational assistance. Secondly, that program for the blind is publically funded by a combination of 80% Federal funds and 20% state of Washington funds. Thirdly, petitioner Witters at the time the public funds were denied was enrolled in the Inland Empire Bible School in Spokane, Washington. The Bible School is a private institution supported by private donations which provide a Christian education offering a three-year Bible diploma and a four-year Bachelor of Arts degree. Petitioner Witter is presently engaging in the four-year program in order to equip himself for a position as a pastor, missionary or youth director. Petitioner Witters, as a result, was denied vocational rehabilitation funds by the Washington State Commission for the Blind because of its policy statement which states:

> "The Washington Constitution forbids the use of public funds to assist an individual in the pursuit of a career or degree in theology or related areas."

Lastly, on appeal the Washington Supreme Court upheld the Commission's ruling.

SUMMARY OF ARGUMENT

Historically, the Federal government's position towards religion has been a position of *accommodation*. The Framers, when writing the U.S. Constitution, were concerned with accommodating religious freedom, expression, and education not its eradication from public life. This Court has relied upon the intent of the Framers of the Constitution for a proper interpretation of the Establishment Clause. The Framers who advocated public support for religion would not have used the First Amendment to prohibit public financial aid to a religious blind student who wanted to become a minister.

In ruling, the Washington Supreme Court erred by misapplying the tripartite test found in *Lemon* v. *Kurtzman* 403 U.S. 602 (1974). The primary effect of granting public aid to blind students does not advance religion if it happens to benefit a religious blind student. Allowing a religious student to participate in a neutral government program is not a violation of the Establishment Clause but rather a proper fulfillment of that blind student's right to public aid under the laws.

The Washington Supreme Court failed to analyze the overall context of the state practice to determine whether its primary effect is to advance religion. The Court *cannot* focus exclusively on the religous component of any activity because it would inevitably lead to its invalidation under the Establishment Clause. Such focus is improper. The Supreme Court of Washington should have analyzed the effect of the overall Washington program to provide vocational training to any and all blind students. Instead, the Washington Supreme Court analyzed solely its effect of helping a religious blind student attain his choice of vocation as a minister.

Lastly, by singling out Larry Witters and refusing to grant him public benefits even after he met all requirements necessary for handicapped recipient, the Washington Commission has violated Witter's free exercise of his religion in pursuing a religious vocation.

ARGUMENT

I The Original Intent Of The Framers To Accommodate Religion Does Not Prohibit Public Benefits To Be Distributed To Religious Individuals Under The Establishment Clause

When the Framers of the U.S. Constitution wrote "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;" they intended to accommodate religion, but not to establish it. Justice Joseph Story, who serves on the U.S. Supreme Court for 34 years, summarized the purpose of the Establishment Clause,

> . . . At the time of the adoption of the Constitution, and of the First Amendment to it . . . the general if not the universal sentiment in America was, that Christianity ought to receive encouragement by the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship . . . the real object of the Amendment was . . . to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive partronage of the National Government.

J. Story, 2 Commentaries on the Constitution of the United States 593-95 (2d ed., 1851). This Court confirmed this interpretation in 1971 when it stated that the purpose of the religion clauses in the First Amendment is "to prevent, as far as possible, the intrusion of either [the church or the state] into the presincts of the other". *Lemon* v. *Kurtzman*, 403 U.S. 602, 614, 91 S.Ct. 2105, 2112, 29 L.Ed.2d 745 (1971). The main emphasis then, of the First Amendment is to create a degree of separation between the institution of the church and the institution of the state. No existence of separation, however, is required

between a religious individual and the institution of the state unless the state inhibits the individual's free exercise of that religion. Witters, a religious individual, is being denied state benefits because the state claims Witters' participation in the program would establish religion. The fact remains that the public aid is being denied to a religious individual solely because he is pursuing a religious vocation. Witters is not a religious institution from which the state must separate itself but only a religious individual.

Of course, "total separation is not possible in an absolute sense," *Lemon* v. *Kurtzman, supra*, even between the institutions of church and state. This Court recently emphasized that the Constitution does not require complete separation of church and state;" . . . it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility to any." *Lynch* v. *Donnelly*, 104 S.Ct. 1355, 1359 (1984). Rejecting a claim that a released-time program at a public school violated the Establishment Clause, Justice Douglas, writing the opinion for this Court, emphasized, "We are a religious people whose institutions presuppose a Supreme Being." *Zorach* v. *Clauson*, 343 U.S. 306, 313, 72 S.Ct. at 684 (1952). There has been, in fact, an unbroken history of official acknowledgement, by all three branches of governments, of the role of religion in American life from 1789 until today. *Lynch, supra*, 104 S.Ct., at 1360. In light of government accommodation of religion since the birth of the United states as a country, the act by the Washington Commission to deny a blind student public aid only because he seeks to pursue a religious vocation shows "callous indifference" toward religion which was never intended by the Establishment Clause. *Zorach, supra*, 343 U.S., at 314, 72 S.Ct., at 684. Such hostility toward religion would bring us into "war with our national tradition as embodied in the First Amendment's guaranty of free exercise of religion." *McCollum* v. *Board of Education*, 333 U.S. 203, 211, 212, 68 S.Ct., 461, 465 (1948).

As the U.S. Supreme Court has emphasized in the past, "historical evidence sheds light not only on what the draftsmen

intended the Establishment Clause to mean but also how they thought that Clause applied . . . [and] their actions reveal their intent." *Marsh* v. *Chambers*, 103 S.Ct.3330, 3344 (1983). For example, James Madison and Thomas Jefferson, both credited with contributing to the writing of the Establishment Clause, extensively sought to accommodate religion. In 1803, Jefferson proposed to the U.S. Senate a treaty with the Kaskaskia Indians in which the Federal Goverment would agree to "give annually for seven years one hundred dollars towards the support of a priest" and "further give the sum of three dollars to assist the said tribe in the erection of a church." *A Treaty Between the United States of America and the Kaskaskia Tribe of Indians*, 7 Stat. 78-79 (Peters ed. 1846). Jefferson, in addition, as President of the school board in the District of Columbia, had the Bible and Watts Hymnal used as primary texts in public schools. J. Wilson, *Public Schools of Washington*, 1 Records of Columbia Historical Society 4 (1887). Justice Reed also has pointed out that Jefferson advocated that religious instruction be taught at the University of Virginia even though the university was completely controlled by the Commonwealth of Virginia. *McCollum, supra*, 333 U.S. at 245-246.

Madison, similarily, voted for a bill authorizing payment of ministers for their services. *Marsh, supra*, 103 S.Ct. at 3333. Since the members of the First Congress, as a result, voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment, they could not have intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable. *Lynch, supra*, 103 S.Ct. at 3335. In applying the First Amendment to the states through the fourteenth Amendment,

> It would be incongruous to interpret that clause as imposing more stringent first Amendment limits on the states than the draftsmen imposed on the Federal Government.

Lynch, supra, 103 S.Ct at 3335.

Providing public benefits for an eligible blind student who has chosen to become a minister seems to agree fully with the

Framer's intent regarding the Establishment Clause. The fact that House Chaplains are paid with public money (as affirmed by this Court in *Marsh*, *supra,)*, clearly supports the payment of public money to a religious student to pursue ministry without causing any violation of the Establishment Clause. For the state of Washington to claim their standards regarding establishment of religion are more stringent then the Federal Constitution, thus preventing Witters from receiving aid, completely contradicts this Court's longstanding position of interpreting the Establishment Clause in light of the framer's intent. The intent of the Framers was to accommodate religion, not to effect total separation from and the eradication of religion.

II Granting Of Financial Aid By The Washington Commission For The Blind to A Handicapped Student Who Is Pursuing A Religious Vocation Does Not Have the Primary Effect Of Advancing Religion.

In order to withstand a challenge under the Establishment Clause, the granting of educational assistance requested by Witters, must satisfy all three parts of the *Lemon* test, which requires:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster "an excessive government entanglement with religion."

Lemon v. *Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 21111, 29 L.Ed.2d 745 (1971). The first and third part of the tripartite test have been satisfied and are not in dispute in this case. According to the Washington Supreme Court, Witters failed the second part of the test. The court held,

> The provision of financial assistance by the state to enable someone to become a pastor, missionary, or church youth director, clearly has the primary effect of advancing religion.

Witters v. *Commission for the Blind*, 689 P.2d 53, 56 (Wash. 1984)

In other words, the Washington Supreme Court is concluding that the state must single out handicapped college students who wish to pursue religious careers and deny them vocational rehabilitation assistance that is otherwise available to all handicapped college students in Washington. Although individual Establishment Clause challenges have been raised against individual religious institutions, this is the first time that the Clause has been used to challenge the right of a single individual to participate in a neutral program.

In every case prior to this, the Court has focused on the primary effect of the entire program in question, not on how each individual recipient uses the public funds. The primary effect of the Washington Commission for the Blind is neutral: The program merely grants vocational rehabilitation aid to all handicapped students equally. The fact that a few recipients might choose to spend their money on vocational training in order to pursue a religious career does not give the program a "principal or primary effect" of advancing religion. The program as a whole successfully accomplishes the secular effect of enabling handicapped students to be trained in a vocation to support themselves. This secular effect of the program fulfills the Washington Commission's purpose for the program which the Washington Supreme Court found to be a clearly secular purpose. *Witters*, 689 P.2d at 56.

In *Widmar* v. *Vincent*, 454 U.S. 263 (1981), this Court reasoned that the overall content of the state practice (or program) is directly relevant in determining its primary effect. In this case, the state of Missouri challenged the use of facilities at the University of Missouri at Kansas City for religious worship and speech as violating the Establishment Clause. This Court held that absent evidence of domination of university facilities by religious groups, advancement of religion would not be the primary effect of allowing the school facilities for use by all

groups. This Court further emphasized that "the provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Widmar*, 454 at 274. The fact therefore, that one recipient of public aid uses such aid for training in a religious career does not defeat the overall secular effect of the Washington Commission's provision of benefits "to so broad a spectrum of groups."

In support of the above, this Court held in 1983,

> As *Widmar* and our other decisions indicate, a program . . . that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.

Mueller v. *Allen*, 463 U.S. 388, 398-399 (1983). In this case, the Court concluded that it was not a violation of the Establishment Clause to permit parents of private school students to be given a tax deduction for tuition payments even though this program was used primarily by religiously educated students. The *Mueller* decision resulted in religious students being treated in an equal manner as secular school students. If Witters was allowed to receive aid for the handicapped, he as a religious student would be treated exactly like all non-religious blind students seeking training in a vocation.

The sole factor that some religious students benefit from public aid does not conclude the state benefit program is in violation of the Establishment Clause. There is no doubt that supplying Witters with financial aid in order to become a minister has the effect of advancing religion in some sense. This Court, however, has made it completely clear that

> Not every law that confers an 'indirect', 'remote', or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid.

Committee for Public Education and Religious Liberty v. *Nyquist*, 413 U.S. 756 at 771, 93 S.Ct., at 2965 (1973); see also *Widmar, supra*, 454 U.S. at 273. The fact that Witters is planning to use his financial aid to pursue a religious career has an incidental effect of advancing religion. The program as a whole, however, still fulfills its secular purpose by providing support to all blind students to be trained in a vocation to achieve self-support. When Witters attains self-support by being trained in a religious career, the effect of the Washington benefits will be secular.

This reasoning above was confirmed in several older decisions that this Court summarized in *Roemer* v. *Board of Pub. Works*, 426 U.S. 736, 96 S.Ct. 2337 (1976). This Court upheld grants given by the State of Maryland to several religious and nonreligious colleges alike. Since the grants were not given to only religious schools, the overall effect of the state grants remained secular. This Court emphasized that

> Religious institutions need not be quarantined from public benefits that are neutrally available to all. The Court has permitted the state to supply transportation for children to and from church-related as well as public schools. *Everson* v. *Board of Education*, 330 U.S. 1 (1947). It has done the same with respect to secular textbooks loaned by the state on equal terms to students attending both public and church-related elementary schools. *Board of Education* v. *Allen*, 392 U.S. 236 (1968) . . . the state was merely "extending the benefits of state laws to all citizens." *Id*, at 242. Just as *Bradfield* [v. *Roberts*, 175 U.S. 291] dispels any notion that a religious person can never be in the state's pay for a secular purpose, *Everson* and *Allen* put to rest any argument that the state may never act in such a way that has the incidental effect of facilitating religious activity.

-426 U.S. at 746-7

The fact that in *Allen*, *supra*, *Everson*, *supra*, and *Tilton* v. *Richardson*, 403 U.S. 672 (1971), the beneficiaries included *all* school children and *all* ins ions of higher learning, no primary effect of advancement o religion was found by this Court (see *Nyquist, supra*, 413 U.S. at 782 n.38). Therefore, since the Washington Commission for the Blind's program is available to *all* blind students, no primary effect of advancing religion should be found even if some blind student beneficiaries happen to be pursuing a religious vocation.

The Washington Commission for the Blind's Program is neutral and valid since it is directed to a broad class of students not predominantly composed of students attending religious schools. The fact that some religious students do receive public support is merely incidental to the secular effect and purpose of the program much like state provided police and fire protection which is available to all citizens regardless of their religious affiliation [see *Wolman* v. *Essex*, 409 U.S. 808 (1972).]

The dissent in *Witters* concluded accurately.

> It is highly likely that only a very small percentage of the handicapped students benefitted by the program would choose to pursue religious career training, and that those that do will provide the institution they attend only indirect and incidental benefits from state funds resulting entirely from the individual students own personal, uncoerced choice of college, a situation that grants no "imprimatur of state approval" for any particular religious college or career.

689 P.2d at 62.

CONCLUSION

The Washington State Commission for the Blind's denial of financial aid and the Washington Supreme Court's ruling constitute a misapplication of the Establishment Clause. Historically, the Federal Government's position towards religion has been a position of accommodation. The Framers of the Constitution who advocated public support for religion would not have used the first Amendment to prohibit public financial aid to a religious blind student who wanted to become a minister. In fact, they authorized payment of public money to the appointed House chaplains.

The primary effect of the Washington Commission for the Blind's financial program is neutral, providing vocational rehabilitation aid to all handicapped students equally. The program as a whole successfully accomplishes the secular effect of enabling handicapped students to be trained in a vocation to support themselves. This overall context of the

state practice is directly relevant in determining its primary effect. The fact that one recipient of public aid uses such aid for training in a religious career does not defeat this overall secular effect of the Washington Commission's provision of benefits "to so broad a spectrum of groups."

It is urged that this Court decide this case in favor of the blind student's right to a public benefit and thereby prevent future discrimination and exclusion of students in need of financial assistance merely because of their religious beliefs.

Respectfully submitted,

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